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FILED  
District Court

OCT 21 2005

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

6 Attorney for Defendant

7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE**  
9 **NORTHERN MARIANA ISLANDS**

10 UNITED STATES OF AMERICA ) CRIMINAL ACTION NO. 05-0027  
11 )  
12 Plaintiff )  
13 ) REPLY SUPPORTING  
14 v. ) MOTION TO QUASH SUBPOENA  
15 ) DUCES TECUM SERVED ON  
16 ZHENG MING YAN ) DEFENSE COUNSEL  
17 )  
18 Defendant ) Date: Oct. 25, 2005  
19 ) Time: 8:30 a.m.  
20 \_\_\_\_\_

21 The Ninth Circuit has recently held that:

22 [i]n determining whether a subpoena of the lawyer is "unreasonable  
23 or oppressive," the district court may properly consider, among  
24 other factors, whether compliance would likely destroy the  
25 attorney-client relationship, and whether the information sought  
26 from the lawyer is already available from other sources.

27 *United States v. Bergeson*, --- F.3d ----, 2005 WL 2559717 at 2 (Oct. 13, 2005).

28 Continuing *Bergeson* notes that the government does not need the evidence bears  
on whether the subpoena is "unreasonable," and that it would destroy the

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1 attorney-client relationship bears on whether the subpoena is "oppressive."

2 *Bergeson*, 2005 WL 2559717 at 3. Moreover, although evidence possessed by a  
3 defense counsel may be the "simplest, clearest way to prove" a matter, that "does  
4 not make it necessary. *Bergeson*, 2005 WL 2559717 at 3

5  
6 In this case,. The prosecution has been free at all times to interview Yen to  
7 ascertain what the documentation consisted of. It apparently has not done so.  
8  
9 Instead it is preceding on a speculation as to what the documents are. Even more  
10 so, Yen has submitted a declaration under penalty of perjury regarding the  
11 documents at issue. Yen's declaration establishes what the documentation  
12 consists of. Yen's declaration is not disputed by the prosecution. Noticeably, the  
13 prosecution does not submit any declaration or make any statement under oath  
14 or penalty of perjury to support the allegations contained in its opposition.  
15

16  
17 Moreover, the prosecution claims evidentiary concerns as a basis for  
18 obtaining the documents. However, evidentiary issues are not a matter before the  
19 grand jury as the prosecution can rely on hearsay. *Bergeson*, 2005 WL 2559717 at  
20 3. The prosecution asserts that it wants the documents to ensure that it has a  
21 complete set of documents. These explanations as well as the others contained in  
22 the opposition show that the prosecution wants the documentation solely for  
23 purposes of trial preparation. The claim the documents Yen processed with various  
24  
25  
26

1 Commonwealth agencies is for an ongoing grand jury investigation is merely  
2 camouflage. Indeed, if the documents were that necessary, the prosecution would  
3 have subpoenaed them from Yen at the time it first sought the indictment against  
4 Zheng.  
5

6 Lastly, and most importantly, the issue of the prosecution serving the  
7 subpoena for purposes of creating a conflict between Zheng and her attorney is of  
8 paramount importance. *Bergeson, supra*. The prosecution is noticeably silent on  
9 that issue. *Bergeson* notes that  
10

11 Rule 17(c)(2) does not require a legal decision whether testimony  
12 of a lawyer against his client before a grand jury would necessarily  
13 destroy the attorney-client relationship. For purposes of the  
14 exercise of discretion, it is enough that the district judge think  
15 destruction likely, and the greater the likelihood, the greater the  
16 potential for oppressiveness.


17 2005 WL 2559717 at 4. The prosecution's silence on this matter in conjunction  
18 with its chain of custody argument in its opposition strongly suggest the  
19 prosecution is seeking to create a conflict of interest for purposes of depriving  
20 Zheng of her counsel of choice.  
21

## 22 CONCLUSION

23  
24 The motion to quash should be granted.  
25

1 The uncontroverted Yen declaration establishes that the documentation the  
2 prosecution seeks can be obtained from Commonwealth government agencies  
3 thereby meaning it is unnecessary to subpoena defense counsel. The prosecution's  
4  
5 opposition shows that it is subpoenaing defense counsel on mere speculation and  
6 for trial preparation purposes. Most importantly, it appears that the prosecution  
7 may trying to create a conflict of interest in order to deprive Zheng of her counsel  
8 of choice. Its silence on the issue strongly suggests that the attempt to create a  
9 conflict is an underlying or predominate purpose for subpoenaing defense counsel.  
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